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In The

Supreme Court of the United States

October Term, 1984

CHIC MAGAZINE, INC.,

Petitioner-Defendant,

vs.

ED BRAUN AND JEANIE BRAUN,

Respondents-Plaintiffs.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's entire presentation is flawed by the fatal assumption that by disregarding the overwhelming evidence of CHIC's willful and reckless conduct, this case can be repostured into a challenge of petitioner's rights guaranteed by the First and Fourteenth Amendments. No such challenge is presented by this case. The First Amendment has never been successfully used as a shield to protect a publisher who deliberately conceals the true nature of a publication in order to obtain photographs which are published, not to convey any newsworthy message, but rather to sexually arouse and appeal to the purient interest of its readership. Properly analyzed, the questions presented for review are as follows:

1. Whether Jeanie Braun is a public figure for purposes of applying the actual malice standard of *New York Times v. Sullivan.*

2. Whether a publication depicting newsworthy material has a constitutional privilege when the material is published in a manner that is highly offensive to a reasonable person.

3. Whether publication of Jeanie Braun's photograph in CHIC was an invasion of privacy.

4. Whether the jury was properly allowed to consider the context of CHIC in determining whether publication was an invasion of privacy.

5. Whether the evidence established both actual and exemplary damages which were properly submitted in the court's charge.

6. Whether the jury's answer to Interrogatory number 7 will support the trial court's judgment.

7. Whether there was valid consent to publish the photograph.

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STATEMENT OF FACTS

Petitioner has presented a distorted interpretation of the record which in some instances is factually inaccurate. To correct these distortions and to focus on the issues actually presented, a complete statement of facts is essential.

CHIC magazine, (PX. 5), is a Larry C. Flynt publication which has as its dominant theme "female nudity," (R. 82), and "nude women," (R. 69), revealing the "female genitalia" in "a manner in which it will sexually arouse men." (R. 70). In fact, the photograph department has been directed to have models physically "manipulate" their genitals, (R. 74), with the result that the women are portrayed as either being "ready" or having "just completed a sex act." (R. 83). The editor of CHIC, Jean-Louis Ginibre, agreed that the magazine depicts "unchastity in women." (R. 73, 124). The magazine features caricatures which are "indecent" according to CHIC's associate art director, Kathleen Philpott, (R. 87), and in some photos the magazine shows a "sexual act going on" between a man and woman. (R. 88).

Included in this magazine is a section called "Chic-Thrills." Henry Nuwer had overall responsibility for the "Chic-Thrills" section of the December, 1977 issue of CHIC. (R. 110). The associate art director for the "Chic-Thrills" section was Kathleen Philpott, (R. 79), who stated that the dominant theme that runs throughout the magazine is "female nudity," (R. 82), featuring female genitals in poses called a "beaver shot." (R. 83). Ms. Philpott was very quick to point out that *all* of the girls that appear in the magazine sign a release, (R. 84), have a complete understanding of the "type and nature"

of the magazine, (R. 85), and are "fully advised" about the type of publication. (R.85).

More importantly, Ms. Philpott made it clear that she always gets the permission of anybody whose picture appears in the "Chic-Thrills" section:

> "Q. Do you seek out the permission of anybody who is actually shown in the photograph before you publish that photograph in this section—Do you try to?
>
> A. Yes.
>
> Q. And you have a form that you're familiar with that you used to make sure that *you have their permission before you publish their photographs when you're responsible for it in the 'Chic-Thrills' section;* is that correct?
>
> A. Yes—well.
>
> Q. Do you have those here in your office, the forms that you use?
>
> A. I believe the Photo Department has them.
>
> Q. Do you have any in your office?
>
> A. No. I get them from the Photo Department as I need them." (emphasis added.)

Ms. Philpott also stated that if she was requesting a photograph of a person to be used in CHIC she would be certain to "point out all of the characteristics of the magazine," which is "predominantly female nudity." (R. 106).

Henry Nuwer is the CHIC employee responsible for putting Jeanie Braun's picture in the December, 1977 issue of CHIC. (R. 110). Nuwer bills himself as "a writer who floats," (R. 108), who was "a crazy headline man."

(R. 109). While at CHIC, he wrote the filthy titles for the articles, which he described as "funny puns," (R. 110), and had full responsibility for the "Chic-Thrills" section. (R. 110). In addition, he wrote the article on page 96 of this issue entitled, "Balcones Fault. Asses On The Line," accompanied by a picture of nude males he described as, "The sharpest shooters out of Texas since Lee Harvey Oswald." (PX. 5 at 96; R. 134).

In July, 1977 Nuwer called Jennifer Ross Benton in the public relations office in Aquarena Springs in San Marcos, Texas, (R. 33), and grossly misrepresented the nature of his magazine. When she questioned him about his magazine, Ms. Benton was led to believe it was "Shic" magazine, (R. 34), a "fashion magazine with travel articles in it." (R. 33). When questioned further, he stated it had the same readership as "Redbook or McCalls." (R. 33). Not *once* did he mention that the true purpose of the magazine was to depict female nudity, (R. 33), that it advertised various sex gadgets for sale, (R. 33, 133), that the articles are all sexually oriented, (R. 131), that the pictures "depict unchastity," (R. 124), that it is designed to "sexually arouse men," (R. 70, 124), or that pot smoking paraphernalia was advertised on the back cover. (PX. 5). Nuwer's cavalier explanation for this glaring omission was simple, "The idea of nudity did not come up in the least. She didn't ask it and I didn't present it." (R. 2, 33).[1]

---

[1]CHIC tried to convince the jury that Nuwer told Mrs. Benton it was a "men's magazine" which featured "fashion" and "travel" articles. (R. 113). This specious effort failed when it was established that there were *no* fashion or travel articles in CHIC. (R. 123, 128).

As a result of this conversation, several photographs were sent to Nuwer. One photograph was of Jeanie Braun in the Aquarena pool holding a feeding bottle. It also shows a pig she had trained diving toward the oversized nipple on the feeding bottle. It was this photograph which was published in the December, 1977 issue in the "Chic-Thrills" section.

Sometime after July, 1977, both Nuwer and Ms. Philpott called Ms. Benton concerning a delay in receiving the requested photographs. It is undisputed that neither ever told Ms. Benton the predominant theme of CHIC. (R. 104). "The idea of nudity never came up." (R. 234).

In order to shorten this brief, references to other portions of the record will be made as applicable in the argument.

SUMMARY OF ARGUMENT

The jury found on ample evidence that CHIC's conduct in publishing Mrs. Braun's picture in the "Chic-Thrills" section of the December, 1977 issue constituted an invasion of privacy and was done with such willful and reckless disregard for her rights as to justify punitive damages. In this instance, CHIC failed to follow its customary rule that a photograph release be obtained from anybody whose photograph appeared in CHIC. Having failed by its own neglect, CHIC now seeks to have the First Amendment used as a shield to cover its negligence.

CHIC's strained effort to erect a First Amendment constitutional challenge in this case is misplaced. Jeanie Braun's picture was neither sought nor published as a

newsworthy event. It was sought by CHIC's "pun" writer to be used in his "Chic-Thrills" section, a section of the magazine dedicated to sexually ridiculing women; a use the jury found was "highly offensive to a reasonable person." (R. 22, Vol. 1).

ARGUMENT

I. Jeanie Braun is not a public figure for purposes of applying the actual malice standard of New York Times v. Sullivan.

Completely disregarding its conduct in obtaining Jeanie Braun's photograph, its failure to acquire its customary release, and the jury findings in this case, CHIC argues that Jeanie Braun is a public figure and therefore, must satisfy the actual malice requirement of *New York Times v. Sullivan*, 376 U.S. 254 (1964). The landmark case of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) provides invaluable guidance into the determination of public figure status:

> "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

Id. at 351.

A careful reading of *Gertz* reveals two important characteristics determinative of public figure status,

neither of which is present in this case. First, public figures usually enjoy significantly greater access to public channels of communication and thus, have a more realistic opportunity to rebut defamatory charges. Second, public figures can be said to have voluntarily exposed themselves in a meaningful sense to an enhanced risk of injury or invasion of privacy.

Under the *Gertz* standard, it is clear that Jeanie Braun is neither an "all purpose" nor a "limited" public figure. She clearly does not have the fame and notoriety requisite to general public figure status. Equally clear, since this action involves no public controversy, Jeanie Braun did not inject herself into any public controversy or assume any "special prominence in the resolution of public questions" in order to become a limited public figure. Therefore, the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964) does not apply in this case.

It is instructive to consider a later U. S. Supreme Court opinion which applied the *Gertz* standard in the context of a libel action against TIME Magazine. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court held that the plaintiff, a socialite and the former wife of the heir to the fortune of one of American's wealthier industrial families, was not a public figure within the *Gertz* definition. It was crucial to the Court that:

> "Respondent did not assume any role of a special prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."

Id. at 453. If an individual of the social prominence of the plaintiff in *Firestone* is deemed a private individual

for purposes of libel law, it is difficult to see how Jeanie Braun could be considered anything other than a private individual.

II. A defamatory publication depicting "newsworthy" material has no constitutional privilege when the material is published in a manner that is highly offensive to a reasonable person.

CHIC's contention that Jeanie Braun's photograph was published to depict a "newsworthy" event or an event of "public interest" is without merit. First, it was never intended by CHIC to be published as a "newsworthy" event. It was published in the "Chic-Thrills" section in which every single photo, article, blurb, or comment is an attempt to sexually ridicule women. It was only called upon to be "newsworthy" when CHIC started scurrying around to escape liability for failing to follow its customary practice of obtaining a photograph release before publishing photographs in this section.

Second, the notion that defamatory publication of matters of public or general interest regarding private individuals is protected by the actual malice standard of *New York Times v. Sullivan* has been explicitedly rejected by the Supreme Court on several occasions.[2] Most recently, in *Wolston v. Reader's Digest Ass'n,* 443 U.S. 157, 168 (1979) the Court held that newsworthiness alone does not insulate a defamatory publication for liability. The Court reasoned:

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[2]CHIC's argument that the *New York Times v. Sullivan* requirement of actual malice is a necessary element of Mrs. Braun's case is mooted somewhat by the jury's answer to Interrogatory number eleven (11) that CHIC acted in willful or reckless disregard in publishing Mrs. Braun's photograph.

> "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971), which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today. A libel defendant must show more than mere newsworthiness to justify the application of the demanding burden of *New York Times*."

Id. at 167-68; *see Rinsley v. Brandt*, 446 F. Supp. 850, 855-56 (D. Kan. 1977) (concludes newsworthiness or public interest doctrine has been abandoned in invasion of privacy actions).

Publication of newsworthy material is protected only to the extent that it is "publicized in a manner that is not highly offensive to a reasonable person." *See Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980). If reasonable minds might differ whether the published material could be highly offensive to a reasonable person, a fact issue exists for jury determination. *Golden Bear Distrib. Sys. v. Chase Revel, Inc.*, 708 F.2d 944, 948 (5th Cir. 1983). The jury found that "Chic published Ms. Braun's picture in a manner highly offensive to a reasonable person," (R. 22, Vol. 1), a finding compelled by the publication of Jeanie Braun's photograph in the midst of grossly pornographic photographs and material whose only stated purpose is to "sexually arouse men." (R. 70).[3]

---

[3]CHIC's contention that it was saddled with the burden of proof ignores the practicalities of the charge submitted to

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As noted by the court in *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980) the protection for newsworthy material is directed toward "issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period." Surely, information regarding a children's show with a trained diving pig and its trainer is not needed to help individuals cope with the exigencies of their period.

III. Publication of Jeanie Braun's photograph in CHIC was an invasion of privacy.

The jury found that CHIC's publication was an invasion of privacy. A cause of action for invasion of privacy has been established in Texas since *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973). The cause of action protects the right of an individual to "be left alone, to live a life of seclusion and to be free from unwarranted publicity." *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973); *accord, Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 490 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Wolfe v. Arroyo*, 543 S.W.2d 11, 13 (Tex. Civ. App.—San Antonio 1976, no writ). This right may be violated by publicity which places the plaintiff in a false light in the public eye or by an appropriation of the plaintiff's name or likeness for the defendant's benefit or advantage. For example, a plaintiff's right to privacy is violated by the unauthorized appropriation of his name and likeness for advertising. *See Kimbrough v.*

(Continued from previous page)

the jury. To establish liability, plaintiff was required to obtain an affirmative answer to Interrogatories numbers 7 and 8. The burden was clearly on plaintiff to prove this element of her case.

Coca-Cola/USA, 521 S.W.2d 719, 722 (Tex. Civ. App. Eastland 1975, writ ref'd n.r.e.).

Both of these elements of invasion of privacy are established in this case. First, the picture published amid the pornography exhibited by CHIC magazine places Mrs. Braun in a false light in the public eye. Second, CHIC has appropriated Jeanie Braun's likeness for CHIC's benefit or advantage. An analogous case was used as an illustration in the RESTATEMENT OF TORTS (SECOND) § 652E, comment c, illustration 8 (1977). In that case, *Leverton v. Curtis Publishing Co.*, 192 F.2d 974 (3rd Cir. 1951), the plaintiff had been run over by a car. A nearby photographer took a picture of her, and the dramatic photograph was published in a newspaper the following day with the news story. Twenty (20) months later, the defendant used the photograph to illustrate his story entitled, "They Ask to be Killed," which emphasized pedestrian carelessness and negligence. A judgment for plaintiff was upheld on the basis of an invasion of privacy. *Id.* at 977-78.

It is strikingly similar that the use of a photograph in the *Leverton* was not intrinsically offensive in a context which made it a news item. When it was republished twenty (20) months later, however, it became offensive just as Mrs. Braun's photograph placed her in a false light when it was inserted amid photographs of professional models who physically have had their genitalia manipulated to simulate the after-effects of intercourse.

Martin v. Johnson Publishing Co., 157 N.Y.S.2d 409 (Sup.Ct. 1956) is another case in which photographs published in an unfavorable context were found to constitute invasion of privacy. In *Martin* the court found both a

libel and an invasion of privacy when pictures for which the plaintiff had posed for use in EBONY were used instead in another magazine to illustrate a story entitled "Man Hungry." *Id.* at 411. In another case, *Gill v. Curtis Publishing Co.*, 239 P.2d 630 (Cal. 1952) (in bank) the California Supreme Court held that a cause of action for invasion of privacy had been stated when a photograph of plaintiff, in a public place in an affectionate pose, was used in conjunction with another article discussing the perils of "Love at First Sight" based purely on sexual attraction. *Id.* at 635.

False light privacy actions are conceptionally quite similar to defamation actions. In fact, the two actions have often been treated in the same way by the courts. For this reason, the *Gertz* decision and its progeny suggest that the focus in a false light privacy action should be on the status of the plaintiff as a public figure or private individual rather than on the newsworthiness of the publication. *See Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1288 (D.D.C. 1981); *Rinsley v. Brandt*, 446 F. Supp. 850, 855-56 (D. Kan. 1977).

In *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285 (D.D.C. 1981) the court held that the same negligence standard used in defamation actions by private individuals should be applied to false light privacy actions involving private individuals. The court in *Dresbach* noted that in *Time, Inc. v. Hill*, 385 U.S. 374 (1967) an actual malice standard was applied in a false light case, but observed that *Gertz v. Robert Welch, Inc.*, had subsequently held that actual malice need not be proven by a private individual in a defamation action even though the subject

matter of the publication is newsworthy. *Id.* at 1288. The court, noting that *Gertz* was decided after *Time, Inc. v. Hill,* stated:

> "Although the Supreme Court has had no occasion to decide the matter, no reason appears to distinguish false light invasion of privacy actions from defamation actions in this regard."

Dresbach v. Doubleday & Co., 518 F. Supp. 1285, 1288 (D. D.C. 1981); *accord, Rinsley v. Brandt,* 446 F. Supp. 850, 855-56 (D. Kan. 1977).

Texas has adopted a negligence standard for defamation actions involving private individuals. *Foster v. Laredo Newspapers, Inc.,* 541 S.W.2d 809, 819 (Tex. 1976), *cert. denied,* 429 U.S. 1123 (1977). There are no policy reasons which mitigate against the adoption of a similar standard for false light invasion of privacy actions involving private individuals.

IV. The jury was properly allowed to consider the context of CHIC in determining the issues presented.

The false light invasion of privacy tort consists of publicly placing a person in a false light in a manner highly offensive to a reasonable person or a person of ordinary sensibilities. RESTATEMENT OF TORTS (SECOND) § 652E (1977); *see Devlin v. Greiner,* 371 A.2d 380, 389 (N.J. Super. Ct. Law Div. 1977). It is the context in which the picture is published which creates the false light. Commonsense requires that the publication be "considered in its entirety, both the picture and the story which it illustrates." *Martin v. Johnson Publishing Co.,* 157 N.Y.S.2d 409, 411 (Sup. Ct. 1956).

In another case, *Golden Bear Distrib. Sys. v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983), plaintiffs complained that published statements, when considered in the context of the entire article, created false impressions. The defendant countered that the context or surrounding circumstances were irrelevant and that only the portion of the article dealing with plaintiff could be considered by the court. The Fifth Circuit rejected defendant's argument, saying:

> "Although the individual statements printed in the article, if read out of context, were true, the jury found that their overall effect was defamatory."

Id. at 949. The court held that for proper analysis, the publication:

> "must be construed as a whole. If a defamatory meaning *may* exist, then the statement or article is considered ambiguous, and the court must allow the jury to determine whether an ordinary reader would perceive the statement as defamatory." (original emphasis).

Id. at 948.

The Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) left it to the states to define the appropriate standard of care for a publisher of matters injurious to a private individual, and Texas has adopted a negligence standard of care for these cases. *See Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977). Under the appropriate standard, even "newsworthy" information may not be published in a manner that is highly offensive to a reasonable person.

If CHIC had a legitimate section of its magazine devoted to matters of public interest, so that newsworthy

information was presented in a manner that is not highly offensive to a "reasonable person," then the context of CHIC might be unimportant. Such is not the case, however. The record is undisputed that everything in CHIC is sexually oriented, and the jury was entitled to see this content to determine if Mrs. Braun's photograph was published in a manner "highly offensive to a reasonable person." (R. 22, Vol. 1).

Under Texas law, the facts and circumstances surrounding the publication of libelous material are relevant in determining whether the publication is liable. In *Houston v. Interstate Circuit, Inc.*, 132 S.W.2d 903 (Tex. Civ. App. Galveston 1939, no writ) the court held that a motion picture defaming the Texas statesman, Sam Houston, must be viewed in its entirety. The court emphasized that separate scenes could not be isolated from their context:

> "Since the picture as an entirety—as well as in the seven particularized portrayals set out *supra*—is declared to constitute such a libel, it is plain, under the well-settled law of libel, that it must be considered as a whole, from the beginning to the end, in order to determine whether it is libelous and consequently actionable; in other words, separate scenes and sentences may not be isolated from the balance and independently examined—apart from the whole . . . ."

Id. at 906. By the same token, CHIC may not isolate the photograph of Mrs. Braun from its offensive context.

In *Fitzjarrald v. Panhandle Publishing Co.*, 228 S. W.2d 499, 504 (Tex. 1950) the court considered an alleged libel in a newspaper article and stated: "In passing upon the language complained of as libel it must be

considered in the light of all of the facts and circumstances under which it was used." In another case, *Times Publishing Co. v. Ray,* 1 S.W.2d 471, 473 (Tex. Civ. App.—Eastland), *aff'd,* 12 S.W.2d 165 (Tex. 1929), the court reiterated that the publication as a whole must be considered and noted: "A party will not be permitted to carve out isolated words or phrases and have them considered without reference to their settings." In a third case, *Hedgpeth v. Gartman,* 136 S.W.2d 641, 642 (Tex. Civ. App.—Waco 1939), *rev'd on other grounds,* 157 S. W.2d 139 (Tex. 1941), the court succinctly stated the applicable Texas law:

> "The general rule of law in this state is that in determining whether a writing or publication is defamatory in chacater, the language used therein must be considered as a whole and in the light of all pertinent facts and circumstances alleged in connection therewith."

Other jurisdictions have applied the same standard as Texas. *See, e.g., Regan v. Sullivan,* 557 F.2d 300, 308-09 (2d Cir. 1977) (plaintiff's picture placed in "Rogue's Gallery"); *Peay v. Curtis Publishing Co.,* 78 F. Supp. 305, 307 (D.D.C. 1948) (picture of plaintiff taxicab driver with article depicting taxi drivers as ill-mannered and dishonest); *Metzger v. Dell Publishing Co.,* 136 N.Y.S.2d 888, 891 (Sup. Ct. 1955) (picture of plaintiff on street corner with other young men to illustrate article on gangs). In another case, *Russell v. Marboro Books,* 183 N.Y.S.2d 8, 17 (1959), a high fashioned model's picture was placed together with an elderly male who was holding a "dirty book." The court found that the clear implication of the picture, that plaintiff was a "willing call girl," was both false and defamatory.

V. The evidence established both actual and exemplary damages which were properly submitted in the court's charge.

The court properly charged the jury that they could award compensatory damages for personal humiliation, mental anguish and suffering if they found that CHIC invaded Mrs. Braun's privacy. (R. 37, Vol. 1). All of these elements of damage are established in the record.

Ed and Jeanie Braun, married for sixteen (16) years, lived in the small community of Lockhart, Texas where Ed Braun has been a deputy sheriff for thirteen (13) years. (R. 175, 176). In this capacity, Ed Braun patrols the entire county, is highly visible, and is well known. (R. 176). Their primary leisure activity involves raising registered quarter horses and participating in the Texas Barrel Racing Association and the Texas Peace Officer's Rodeo Association. (R. 177).

On Wednesday, November 23, 1977, Mrs. Braun was enroute home to Lockhart from her employment at Aquarena Springs in San Marcos, Texas. (R. 197). Realizing she could run out of gasoline before reaching Lockhart, she stopped at a drive-in grocery store in Maxwell, Texas to purchase gasoline. (R. 180). When she walked in the store a total stranger walked up to her and said, "Hey, I know you" and explained that she was in CHIC Magazine. (R. 197). When Mrs. Braun denied being in any magazine,

> "he went and got the magazine. And I stood there because I was really, really terrified. I thought something was going to happen, my picture is not in this magazine. My legs were like jelly, I couldn't untrack. I was petrified. And he was thumbing through these

> pictures. I was raised in a private Catholic school and I had never seen anything like this. And I was terrified, I didn't know what he had in mind. I thought something horrible was going to happen to me. He flipped through that book and my picture was in that book. I didn't believe it. I stood there like a dummy."

(R. 197-98).

That evening, "She was very upset." (R. 179). She said she "felt like crawling in a hole and never coming out." (R. 200). As a result of this incident, she "did not want to return to work." (R. 199). Her employer at Aquarena Springs stated:

> "Mrs. Braun really took this very very serious. It embarrassed her around the employees."

(R. 158). He was "able to observe a difference in her emotional stability while at work," and observe "humiliation" or "embarrassment" on her part. (R. 159). She was replaced as the Children's Show Director for a year. (R. 200).

As a result of Mrs. Braun's picture being published, Aquarena Springs received correspondence from CHIC readers requesting information and more pictures of "the beautiful lady." (PX. 9 & 10). One such reader identified himself as a convict serving time in a penitentiary.

The evidence clearly satisfied the Texas requirement for invasion of privacy which allows recovery for humiliation and mental suffering even if there is no evidence of a loss of monetary damages. *See Billings v. Atkinson*, 489 S.W.2d 858, 861 (Tex. 1973). In short, the amount of damages in a case of this character, with the compelling evidence which was introduced, is left largely to the discretion of the jury. *Hornby v. Hunter*, 385 S.W.2d 473,

476 (Tex. Civ. App.—Corpus Christi 1964, no writ); *Freeman v. Schwenker*, 73 S.W.2d 609, 611 (Tex. Civ. App.—Austin 1934, writ ref'd).

By the same token, CHIC's conduct in maliciously deceiving Aquarena Springs on not one, but three different occasions, clearly supports the jury's findings that CHIC "acted in willful or reckless disregard" of the plaintiff's rights. (R. 21, Vol. 1). Under the *Gertz* test and Texas law, punitive damages may be recovered when the injured party establishes the existence of a willful or wanton act sufficient to support a finding of malice. *British Overseas Airways Corp. v. Tours & Travel, Inc.*, 568 S.W.2d 888, 894 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.). In *United Press Int'l., Inc. v. Mohs*, 381 S.W.2d 104, 109 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.), a libel action against the international news service, the court stated: "Gross negligence constituting ground for exemplary damages has been said to be that entire want of care which would raise a belief that the act complained of was *the result of conscious indifference to the rights of the person to be affected by it.*" (emphasis added).

VI. The jury's answer to Interrogatory number 7 will support the trial court's judgment.

Defendant's contention that the jury award for invasion of privacy may not be affirmed because it was based on instructions authorizing recovery on either a false light or a misappropriation theory is flawed by the erroneous assumption that separate recoveries were sought on a false light theory or a misappropriation theory. They were not. Recovery was sought for the tort of invasion of privacy—a single tort which is proven by conduct that established either false light or misappropriation.

Defendant's conduct in publishing plaintiff's photograph constituted an invasion of privacy if the conduct either: (1) placed her in a false light in the public eye; or (2) was an appropriation of her likeness for defendant's benefit. The single cause of action is for invasion of privacy. The conduct of defendant establishing an invasion of privacy is the act of either placing her in a false light or an appropriation of her likeness for defendant's benefit.

Although false light and appropriation were the only two acts submitted to the jury to determine if there had been an invasion of privacy, there are actually four areas of conduct which give rise to this tort in Texas. In *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 490 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.) the court observed that the tort of invasion of privacy is based upon

> "the right of an individual to be left alone, to live a life of seclusion, and to be free from unwarranted publicity. *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973). It is generally recognized that the right may be violated by any one of the following acts:
>
> 1. Intrusion upon the plaintiff's physical solitude or seclusion.
>
> 2. Public disclosure of private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation of the plaintiff's name or likeness for the defendant's benefit or advantage."

In the case at bar, Interrogatory number seven (7) submitted only two of these acts which constitute invasion of privacy because only false light or appropriation were

applicable to the facts of this case. The jury's affirmative finding to this interrogatory did not mean two separate theories of tort were established. The jury simply found that there had been an invasion of privacy because plaintiff had been placed in a false light or that there had been a misappropriation of plaintiff's likeness for defendant's benefit.[4]

A direct analogy is found in automobile negligence cases. Although negligence is the tort that is committed, any one of several acts or omissions may give rise to that negligence; i.e., failure to keep a proper lookout, speeding, failure to apply brakes, improper speed. An affirmative finding on any single issue establishes that defendant was negligent and that defendant is responsible for plaintiff's damages. An affirmative finding to all of these issues does not establish an independent theory of liability for which separate damages are awarded. Although any number of separate acts or omissions can give rise to defendant's negligence, only one theory of liability is submitted—negligence. Similarily, only one damage issue is submitted for the injuries caused by that negligence.

As is the case with a negligence cause of action, defendant's conduct in either placing plaintiff in a false light or misappropriating plaintiff's likeness can only give rise to the single tort of invasion of privacy for which the jury may make a single award of damages. Interrogatory number 7 asked whether defendant was guilty of either of two acts which establish this single tort, and the jury's finding of an invasion of privacy is supported by

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[4]Petitioner's argument is further flawed because the evidence does establish a claim for misappropriation of plaintiff's likeness.

ample evidence. In any event, no reversible error exists when "it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it." *E. I. DuPont De Nemours v. Berkley & Co.*, 620 F.2d 1247, 1258 n. 8 (8th Cir. 1980).

VII. There was no valid consent to publish the photograph.

The evidence established and the jury found that CHIC did not obtain valid consent to publish Mrs. Braun's photograph. (R. 22, Vol. 1). Instead, CHIC obtained the photograph and consent through fraud and misrepresentation. Now, CHIC attempts to avoid responsibility for its conduct by contending that Aquarena is solely responsible for harm to Mrs. Braun because Aquarena allowed itself to be deceived by CHIC's representations.

This argument will not withstand even cursory inspection. It was CHIC's conduct in wrongfully procuring and publishing Mrs. Braun's photograph that led to her injury. CHIC cannot insulate itself from liability by hiding behind concepts similar to that of privity, which has been rejected by Texas courts. *See Nobility Homes, Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977). The bottomline is that CHIC, without consent, published a photograph which placed Mrs. Braun in a false light that was highly offensive to a reasonable person. CHIC must accept responsibility for its own conduct, and that responsibility was appropriately placed upon CHIC by the jury.

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CONCLUSION

CHIC's argument asks the court to disregard the true nature of the "Chic-Thrills" section, disregard the jury finding that Mrs. Braun's photograph was published in a manner highly offensive to a reasonable person, and re-examine the evidence in the hope that upon re-examination a different result will emerge. CHIC cannot avoid responsibility for its willful and reckless conduct, and its publication of Mrs. Braun's photograph in a manner which is highly offensive to a reasonable person is not protected by the First Amendment. Therefore, CHIC's petition for writ of certiorari should be denied.

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